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NO. 83-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually; and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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I. RESPONDENT'S DESCRIPTION OF THE EXPERT TESTIMONY IS INACCURATE

In its brief in opposition, respondent inaccurately claims regarding the expert testimony that "the overwhelming effect of the evidence was to demonstrate the film had serious artistic and political value." (Br. in Opp. 4). Respondent then attempts to manipulate the record by citing only the testimony of its experts. The record shows that petitioners offered the testimony of numerous experts on the issues of artistic and political value, as well as on other issues. On the question of prurient appeal, peti-

tioners called Drs. Victor Cline, a respected psychologist and professor at the University of Utah (T. 970), Fred Crawford, an eminent professor of sociology at Emory University (T. 1196), and James Mallory, an Atlanta psychiatrist who was trained at Princeton and Duke Universities (T. 1304).

Petitioners also introduced the testimony of other experts on the question of serious artistic and political value. Msgr. Eugene Clark, former director of communications of the Catholic Archdiocese of New York who has taught in universities and holds the Ph.D. degree from the University of Notre Dame (T. 765). Petitioners also called Drs. James Fletcher, a professor and media-expert at the University of Georgia (T. 1089), Thomas Burns, a professor of ancient history at Emory University (T. 831), and Reo Christenson, a widely-published and distinguished political scientist and professor at the University of Miami (Ohio). (T. 911).

The "overwhelming effect" of the expert testimony was exactly the opposite of what respondent claims. The expert testimony demonstrated that "Caligula" lacks any serious value and, moreover, satisfies the other parts of the obscenity test. It should be noted that petitioners' experts generally testified without charging any fee, whereas Penthouse's experts were paid substantial fees.

II. THE SUBJECT MATTER JURISDICTION ISSUE IS PROPERLY BEFORE THIS COURT

Penthouse says in its brief in opposition that the subject matter jurisdiction issue was not litigated in the district court. It suggests that the matter is not, therefore, properly before this Court. It is true that petitioners did not contest the district court's subject matter juris-

diction while in that forum. Petitioners did raise the issue in the court of appeals.

However, subject matter jurisdiction may be inquired into at any stage in a federal action. In fact, this Court has often held that federal appellate courts have an obligation to examine their jurisdiction even when the issue is never raised by the parties. In *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), the Court noted: "[W]e are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Id.*, at 278. *See also Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 608 n.6 (1978).[1] In the instant case, the issue of subject matter jurisdiction was raised by the Eleventh Circuit panel. On rehearing, petitioners pursued the issue before the court *en banc*.

Unlike Penthouse's assertions, petitioners have never argued that a federal district court has no authority to make factual determinations in a declaratory judgment action. Rather, petitioners have argued that a federal court should not be allowed to decide whether, as a matter of fact, a proposed course of conduct would violate the elements of a state criminal statute. A determination of this sort is not a true federal question.[2]

III. THE RECORD IS CLEAR THAT THE DISTRICT COURT EMPLOYED THE REASONABLE DOUBT STANDARD

Penthouse argues that the record is unclear as to

[1] It should also be noted that federal courts can notice, regardless of the actions of the parties, error which is plain on the face of the record. *Silber v. United States*, 370 U.S. 717, 717-18 (1962).

[2] It is significant that this Court has recently held that the Eleventh Amendment does not allow "a federal suit against state officials on the basis of state law." *Pennhurst State School & Hospital v. Halderman*, 52 U.S.L.W. 4155, 4162 (January 23, 1984).

whether the district court employed the reasonable doubt standard. (Br. in Opp. 14). Penthouse says that the district court does not say in its order that it is using the reasonable doubt standard and, according to Penthouse, petitioners are attempting to mislead the Court. Close inspection of the record shows that the shoe is on the other foot: respondent seeks to mislead the Court.

The record is abundantly clear that the district court applied the reasonable doubt standard. The issue was raised in the proposed pre-trial order and each party filed a brief in support of its position. (R. 167, 230, 253). At the pre-trial conference, which was not recorded inasmuch as all disputed issues would become matters of record at the trial, the district court orally announced that it rejected McAuliffe's position and would apply the reasonable doubt standard. At the trial, the court in both its preliminary and final charges instructed the jury to apply a reasonable doubt standard. (T. 8, 1511). The district court even incorporated the reasonable doubt standard in the language of the special verdict form submitted to the jury—i.e., the jury was asked if it found that there was a reasonable doubt as to any of the enumerated elements of the obscenity test. (R. 299). In its final order, the district court specifically pointed out that the jury had been instructed to apply the reasonable doubt standard. (R. 344 n.4).

The straw at which respondent grasps is the fact that the district court did not expressly say that it was using the reasonable doubt standard but simply said that it found the movie not to appeal to a prurient interest and not to lack serious artistic and political value. Even this straw disappears when one considers that the district court described the findings of the jury in the same terms,

although as noted above its findings were actually expressed in reasonable doubt language. Moreover, the lower court also said:

> This court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex. (R. 331-32).

The significance of this is two-fold: it shows that the district court employed the same standard as did the jury and it demonstrates that the lower court relied on the findings of the jury. Finally, it should be emphasized that the only circuit judge to address this issue observed that it is only reasonable to conclude that the district court employed the reasonable doubt standard. 702 F.2d at 930.

IV. THE IMPORTANCE OF THIS CASE

Penthouse has said nothing to diminish the importance of this case. It has not challenged McAuliffe and Webb's description of the unusual aspects of this movie and its distribution. "Caligula" is probably the boldest hard core pornographic film in history and has been distributed on an unprecedented scale. Certainly, if the obscenity laws are to be taken seriously and are to have any effect they must be correctly applied in, of all cases, this case. Numerous serious and important issues regarding their application have been raised in the petition. Indeed, the split on the Eleventh Circuit demonstrates the presence of such issues. Unlike Penthouse's suggestion, lower courts cannot insulate themselves from Supreme Court review by failing to publish their opinions.

Penthouse's argument that certiorari has never been granted to review a finding of non-obscenity in a lower

court should also be mentioned. As is clear from the petition, McAuliffe and Webb do not ask this Court simply to review factual findings made in an obscenity case. Rather, petitioners contend that the lower courts in significant and important ways misinterpreted and misapplied the Georgia obscenity law and previous decisions of this Court. It should not be forgotten, moreover, that petitioners' first point is that there really is no subject matter jurisdiction here. Petitioners do not know if the Court has ever reviewed a case like this before. However, it is important to note that the vast majority of findings of non-obscenity occur in criminal cases. And, of course, the Double Jeopardy Clause forbids the government from appealing such verdicts. McAuliffe and Webb agree that this case presents a special and unusual opportunity for review. For that reason, the writ should be granted.

Respectfully Submitted,

s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1984, three copies of the foregoing petitioners' reply brief were mailed, postage prepaid, to:

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I further certify that under S.Ct. Rule 28 further service is not required.

GEORGE M. WEAVER

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